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Private Equity

Angola

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1. Trends

1.1 M&A Transactions and Deals

Finance (banking and insurance) and oil and gas are strategic sectors driving M&A transactions in Angola. Although the COVID-19 pandemic has brought oil drilling to a halt in Angola, oil and gas are set to continue playing a vital role in meeting the world's energy needs and having a great impact on Angolan economy and major transactions.

Since 2018-19 the M&A market in Angola has grown considerably, especially due to government reforms that are targeting the improvement of the private sector, notably on investment projects and privatisation.

In fact, Angola's Government launched in 2019 an ambitious programme of privatisation called PROPRIV, which referred 195 companies including public companies and private companies in which the State has a significant participation, whether direct or indirect – in particular through Sonangol E.P. – in their share capital.

Priority Sectors

In addition, priority sectors, notably Agriculture and fishing, are also turning to M&A to find ways to overcome the lack of capitalisation by having new investors (mostly foreign), as well as by absorbing the know-how of such foreign investors and reducing costs.

Manufacturing

On manufacturing industries (beverages is the most significant example) M&A transactions with mostly foreign investors aim to reduce the use and importation of the raw materials or mid-stream products in an attempt to reduce production costs with importations.

Transport and Logistics

Likewise Transport and Logistics Infrastructure remains a major challenge for business in Angola. Rebuilding the country's infrastructure will expand the economy, modernise and better connect its cities. There are a number of projects for infrastructures mostly supported and engaged by public companies, but also opened to deals with foreign investors in partnership with established local private entities.

1.2 Market Activity

Over the past 20 years, Angola has been highly invested in by foreign companies/individuals. The first large transactions were in the oil and gas sector (oil companies and related services' providers) and involved companies with interests in exploration blocks. Those were essentially international operations.

Most recently, with the enactment of the new Private Investment Law in 2018, Angola opened the market to international investment under a more flexible and tolerant approach towards investors. As opposed to the previous legislation, legal requirements for the investment and incorporation of legal entities have now become more flexible and accessible.

Those measures were implemented to diversify the economy and to generate more confidence for private investment. The M&A market is essentially controlled by private entities. In more recent years, major investments have been made in infrastructure, construction, agriculture and hotels with the development of the capital Luanda.

2. Legal Developments

2.1 Impact on Private Equity

Angola has approved a specific legal framework applicable to private equity:

- The Presidential Legislative Decree No 4/15, dated September 16th, which approved a specific legal framework applicable to private equity funds (regulates the investment activity of capital of risk through collective entities set by investment funds supervised by the Angolan Securities Market Commission (*Comissão do Mercado de Capitais*));
- The Securities Code (Law 22/15 of August 31st); and
- Any acquisition or disposal of an equity stake, or the rights and obligations inherent thereto, are governed by the Angolan Corporate Code (*Lei das Sociedades Comerciais* – Law No 1/2004, dated February 13th) and, if traded in the Angolan Stock Exchange market, by the Regulations issued by the Angolan Securities Market Commission (*Comissão do Mercado de Capitais*) that are already in force – despite certain matters still pending further regulation.

Also, and more recently, the private investment law should be highlighted because it has established a set of principles aimed at facilitating, promoting and accelerating investment into Angola.

Finally, taking into consideration the Angolan Privatizations Law, approved in by the Presidential Decree No 250/19, of August 5th, the Privatization Programme relaunched the restructuring and reforming of the public business sector.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

Depending on the business area in which the targeted company operates, investors have to establish contact primarily with the

Angolan Investment and Export Promotion Agency (AIPEX), the Notary, the Companies Register, the Competition Authority (ARC) and any sector-relevant regulatory authority.

In 2018 there was a considerable change in the legal framework due to the enactment of the Angolan Competition Law which started to be implemented and enforced in 2019. To address new restrictive practices identified by the government, it adopted a new sanctions framework and new prior notification obligations. Also, and for company mergers there is a mandatory mechanism that requires the authorisation of the ARC for the effectiveness of the intended transactions.

Note that this competition rules are only applicable to certain types of transactions. The mergers or acquisitions that are subject to this regime and will need the approval of the ARC are the ones in which a specific turnover or market share threshold is exceeded, subject to confirmation of the activity sector in which the transaction will occur.

4. Due Diligence

4.1 General Information

There are three basic pillars to include in a due diligence conducted in private equity transactions in Angola. The corporate governance due diligence review intends to acknowledge all the steps taken since the incorporation of the target company passing through all the legal changes to reach the actual stage and conditions, notably on shareholding, management and changes of corporate by-laws. Under Angolan law, the general rule is that the provisions of by-laws (effective to third parties as well) supersede the provisions of a Shareholders Agreement (which are only effective towards the involved parties).

Private equity (PE) funds and private investors in general typically review and confirm tax good standing of the target companies, notably full compliance and contingency/liability assessments of all different types of taxes that may be imposed upon a particular business.

Key Areas of Due Diligence

The last basic milestone of a due diligence is on labour and employment.

Due diligence is a particularly detailed, and vital, pre-investment phase in Angola. PE funds engage with external local professionals to perform the customary due diligence analysis.

In addition, and depending on the industry where the M&A transaction will occur, PE funds may be required to actively consider all the operational licenses and permits of the specific

type of business. Usually the PE funds have specific sectors of activity as a target (agriculture, fishing, oil and gas), which are subject to specific licensing and local content requirements in Angola, making licensing due diligence a topic addressed separately or within corporate due diligence.

Environmental and social due diligence could also be conducted, but not often.

4.2 Vendor Due Diligence

Vendor due diligence may be described as the investigation and review of the seller's corporate profile. The most common procedure in Angola is that the buyer does not provide request a vendor's due diligence nor the due diligence to the target is carried out by the vendor, but rather by an independent consultant, adviser, auditor to validate due diligence reports.

For private equity investors, the main task is to provide information and data base to ensure that the buyer would get full awareness of the description of the business, the possible risks or the impediments or liabilities of the transaction.

The purpose of vendor due diligence is that of an ancillary tool, but is not commonly used in Angola as due diligence are carried out under the instructions of the buyer and the vendor only provides the documentary support for the due diligence. Also, the scope of the due diligence is typically only the target-company and not the vendor. Typically, investors in Angola (foreign or local) are not interested in reviewing and assessing the corporate profile and liability risk exposure of the vendors. The main reason for this is that most target companies in Angola are limited liability companies which means that the obligations of the company are not passed-on to the shareholders (potential vendors) which most commonly carves-out the Vendor from the scope of the due diligence.

5. Structure of Transactions

5.1 Structure of the Acquisition

Most private equity acquisitions are carried out by way of a private sale and purchase agreement (SPA). This is because most common legal structures in Angola are private limited liability companies (*Sociedades por Quotas*) and, therefore, the transactions are mostly related to the shares (which ultimately already include the assets of the companies).

Due to the nature of private limited liability companies in Angola, tender offers are unusual. The board of directors is almost always composed by the representatives of the shareholders of the company, which means that the transactions are

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carried out by purchase agreement through a friendly takeover approved by the board of directors.

5.2 Structure of the Buyer

Private Equity investment funds (PE) which are interested in investing in Angola are commonly subscribed by limited partners domiciled in Europe or the USA, depending on tax considerations, investment structure and the location of the target company. These PE funds typically invest in Angola through newly created companies – Special Purpose Vehicles (SPVs) – usually incorporated in Angola (local holdings), in a jurisdiction with which Angola has a favourable double taxation treaty (recently Portugal and the UAE), or in jurisdictions which are geographically close to Angola.

It is not very common for PE investors to acquire equity stakes directly in the target companies, but rather using a foreign SPV which will subsequently acquire the shares in the Angolan target.

The PE investment fund may co-invest together with other individuals (top managers) or entities, through the incorporated SPV.

5.3 Funding Structure of Private Equity Transactions

PE funds are most commonly designed as limited partnerships. The PE fund's partners, known as General Partners, manage the PE fund by pick which investments they will include in its portfolios and also are responsible for attaining capital commitments from the limited partners.

Investors hold limited partnership interests in the fund vehicle (SPVs) while the fund manager's team holds an interest in General Partner.

The common profit allocation scheme is usually distributed in the amount of 80% to limited partners, pro rata to their capital contributions, and 20% to the General Partner, ie, carried interest, the latter conditional upon the limited partners having first received their preferred return.

Limited partners sometimes request direct investment in target companies along with the PE fund to increase their exposure to a specific industry sector, or to adjust their risk profile target.

Equity structures are designed with the purpose of providing incentives and minimising the risk-sharing between investors and managers. Due to the lack of expertise of PE management in Angola, this mechanism is really valued to retain human capital.

5.4 Multiple Investors

Historically, PE fund buyers do not generally invite co-investors. This is because, when the Law of Private Investment was launched in 2011, for each investor entity a separate investment project was required. However, with the latest amendments the Private Investment Laws approved in 2014 and 2018, one project may involve more than one investor and is not subject to minimum investment amount requirements.

Where there is an invite for co-investors to invest alongside the PE fund, the leading investor, which has the know-how and expertise takes control and management over the investment and transaction, while the co-investors, usually with a mature and relevant reputation in the market, remain in a background position. Limited partners sometimes request direct investment in target companies along with the PE fund to increment their exposure to a specific industry sector or to adjust their risk profile target.

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms

In Angola, fixed price transactions are favoured by both private equity sellers and buyers.

When the due diligence that usually precedes the transaction is not sufficiently detailed, either because legal compliance is not satisfactorily verified, or because tax liabilities are not defined, private equity sellers and buyers promote fixed prices structures as they offer certainty of value which is a key point for a private equity seller (or buyer).

This structure involves fixing an acquisition price at the time of signing the SPA. The acquisition price paid initially does not exceed 20% or 30% of the total price. Depending on the precedent conditions negotiated and agreed by the parties the final price could be reduced at the time of Closing if liabilities and contingencies will influence the price change.

Joint Ventures

Whereas for joint ventures transactions, locked box mechanism is used to fix the equity price at the time of signing the SPA. The price is calculated using a recent historical balance sheet ("Locked Box Balance Sheet") where cash, debt and working capital are known amounts. By Forecast the performance of the target company the price would be adjusted.

For the corporate seller the structure used is the same as the private equity seller, the transaction is also subjected to the due diligence which dictates the fixed price mechanism.

6.2 Locked-Box Consideration Structures

In private equity transactions, the use of locked box considerations structures is not used and, for that reason, there is no place to charge any interest on leakage.

6.3 Dispute Resolution for Consideration Structures

In PE transactions, locked box or completion accounts consideration structures are not used, but rather the fixed price consideration structure. Therefore, any dispute raised during the transaction is typically solved and settled under the dispute resolution provisions of the legal documentation composed at the first stage by amicable discussions and negotiation. Dispute resolution mechanisms are mainly set forth for disputes that may trigger the termination of the SPA and therefore the non-completion of the transaction.

6.4 Conditionality in Acquisition Documentation

In early 2019, the recently created Angolan competition authority approved its first merger since has become operational. This approval marked the first application of Law 5/2018, Angolan's first competition legislation, which was adopted in May 2018. Anti-trust legislation makes it mandatory for companies envisaging mergers and acquisitions in Angola (including foreign-to-foreign transactions) file to the ARC and ensure that closing does not take place before obtaining clearance.

The law also introduces a merger control regime in Angola. Transactions satisfying the following thresholds must be notified to and approved by the ARC:

- the combined market share exceeds 50%;
- the combined market share is between 30% and 50% and individual turnover in Angola of at least two parties exceeds AOA450 million (approximately USD1.3 million); or
- combined turnover in Angola of all parties exceeds AOA3.5 billion (approximately USD10 million).

Fines up to 10% of the parties' turnover can be imposed if a notifiable transaction is implemented without the ARC's approval.

6.5 "Hell or High Water" Undertakings

"Hell or high water" negotiations are extremely "hostile" for a jurisdiction like Angola where, most of the time, oil and gas, banking and insurance sectors are the object of the transactions. Therefore, there are many regulatory authorisations that could not be granted or the procedure to achieve all the permits, licences, authorisations necessary is time-consuming and could not succeed. Also, due to the nature of the country, Angola has more difficulties ensuring the certainty of the transaction, either because the regulatory authorities do not address the demand

as they should do, or because the documentation that precedes the transaction is generally dispersed.

6.6 Break Fees

The concept of break fees is not legally regulated in Angola and is not commonly used in transactions involving private equity-backed buyers.

6.7 Termination Rights in Acquisition Documentation

Private equity buyers and sellers promote the certainty of the transaction, as such, termination rights are heavily regulated, especially on the buyer's side. It is usual that the sale and purchase agreement is limited to conditions precedent that may not be met in the foreseen time. In fact, it is usual to extend the time foreseen in order for the parties to comply with their liabilities.

SPAs can terminate if those conditions are not satisfied by a long-stop date that is agreed by the Parties if the delay is caused by the Parties. If the cause is due to delays in obtaining official updated documentation, these circumstances do not typically generate the termination of an SPA, but rather extension of the agreed closing date.

6.8 Allocation of Risk

As a general rule, the seller is not the PE fund and the SPA will reflect a less favourable risk allocation to the buyer. In other words, the risk will be very limited to the seller, the transaction it will be occur without any modifications agreed by the parties. The main goal is to reach the closing deal with no substantial changes to the initial offer, except, as mentioned, the price mechanisms will reflect the risk supported by the buyer.

6.9 Warranty Protection

Angolan sellers (irrespective of their nature) are not familiar with granting business warranties in an acquisition agreement.

Instead, whenever there are financing loans, the seller may provide a collateral to minimise the risk of the buyer of keeping up with their financial obligation.

Typically, private equity sellers want to minimise their ongoing liability on the promissory contract, and they may address equity holdings which are burdened with covenants before the transaction occur.

6.10 Other Protections in Acquisition Documentation

Typically, warranty and indemnity insurance are not used in Angolan transactions. Sellers may take over the target company's debt before the acquisition, to guarantee that the sup-

plementary payments or the supplies of the company are not transferred when the transaction is closed.

Escrow accounts and retention mechanisms are typically agreed when the transaction involves financial (banking and insurance) entities which are more familiar with these structures.

6.11 Commonly Litigated Provisions

Judicial and arbitration procedures relating to private equity transactions are not common in Angola. Private equity investors promote the private settlement of the differences with their counterparts.

Given the limited nature of their contractual liabilities, the potential for disputes is limited where private equity sellers are involved.

7. Takeovers

7.1 Public-to-Privates

The Angolan market has no significant experience of public-to-privates due to the fact that capital markets and private equity are still at a very early stage in the country. However, there have been relevant developments in relation to private limited company's going public through the initial public offer process and start being regulated in the Stock Exchange Market.

7.2 Material Shareholding Thresholds

Disclosure thresholds for shares start at 5% in respect of companies having the share capital open to public investment, subsequent thresholds are: 10%, 15%, 20%, 25% and 90% of the voting share capital. The shares of the acquiring company are relevant to calculate these thresholds. If the thresholds are exceeded the acquisition it will be disclosure to the public. Failure to notify a disclosable increase could result in a fine applicable to the shareholder, and the regulator can inform the market that the company is not transparent.

7.3 Mandatory Offer Thresholds

Control may pass before the launching of the bid - Angolan law provides for a mandatory bid rule - or upon completion of the bid. Control has two relevant thresholds: one-third of the voting rights (which may be set aside if the bidder provides evidence that it does not control the target company); or one-half of the voting rights.

The bidder could gain 100% control after the bid if is entitled to exercise a squeeze-out right and consequently purchase the shares of the minority shareholders.

7.4 Consideration

Cash is the more often used form of consideration to acquire Angolan target companies. Issuance of shares may require notification of the offering with the Securities Market Commission, an expensive and time-consuming process.

The parties committed and made available the cash considerations agreement. They are free to establish the terms for the cash consideration's timeline. In public takeovers, the offeror must indicate the date for the cash consideration payment in the offer.

7.5 Conditions in Takeovers

In private transactions, the parties are free to negotiate and offer different terms to different shareholders. Although there could be exceptions to this general rule, as in the company's articles of association might have different types of shares with different rights and also may have certain provisions contained in a shareholders' agreement. In public takeovers, the terms and conditions should be the same to all potential buyers and the offeror's proposal must contain all the mandatory information established in the Angolan Securities Code.

In addition, in the recently enacted privatisation law there are mandatory rules applicable to the acquisition of shares in state-owned companies, held directly by the state.

7.6 Acquiring Less Than 100%

As mentioned, a bidder can exercise a squeeze-out right and consequently purchase the shares of the minority shareholders to assume the 100% control of a target.

Or, instead private equity bidder can try to have influence in the composition of the board of directors, indicating one or more persons to form part of a list to be elected to the board, even when directors cannot represent the relevant shareholders. There is no requirement for such arrangements to be made public in a private equity structure.

Veto rights also may be created to the benefit of private equity bidders, through shareholder agreements. Such arrangements may refer to the exercise of voting rights, but not to the actual exercise of management.

7.7 Irrevocable Commitments

Potential acquires often seek to enter into voting arrangements with target company shareholders in order to obtain the vote in favour of the transaction and against a competing transaction. If there is a friendly context and an obeying of the general rules applicable to a takeover, a bidder may interact with the target in order to enhance the success of its bid.

7.8 Hostile Takeover Offers

Under Angolan Law, there is no distinction between a friendly or hostile acquisition or takeover. It is quite common for such distinction to be made based on non-legal principles: a takeover will be deemed as friendly or hostile based on the response of the target company's board of directors and/or of the relevant shareholders to the relevant takeover bid.

8. Management Incentives

8.1 Equity Incentivisation and Ownership

Equity incentivisation of the management team is often used to give to the management a percentage stake in the ordinary equity for a low cost or returns based on interests remuneration, and is, therefore, an essential feature of most private equity investments.

Incentive alignment between investors and managers drives carried interest remuneration, providing risk sharing and human talent retention which is particularly vital in Angola.

8.2 Management Participation

Sweet equity provides to the management to have an ordinary equity stake in the target company. Typically, sweet equity is offered to a management at the same low price per share as the price paid by the private equity fund. The allocation of ordinary equity stake has been set to 10% to 15% granting management equity incentive awards.

8.3 Vesting/Leaver Provisions

The main goal of sweet equity is to encourage management to remain with the business until a successful exit could be achieved and consequently to returns cash value to the private equity investors.

Thus, it is crucial to the leaver to transfer back the entirety of their incentive equity. Because there are good and bad leavers provisions, it is usual to trigger a call option for investors to ensure that leaving does not affect the value created. This way, the vesting trigger is typically driven by performance.

8.4 Restrictions on Manager Shareholders

Typically, managers are subject to restrictive covenants in the definitive acquisition agreement, which include non-competition, confidentiality and non-disparagement undertakings.

8.5 Minority Protection for Manager Shareholders

In respect of limited liability companies by shares or joint stock companies (*sociedades por quota e sociedades anónimas*), it is possible to stipulate under the bylaws especial rules focused at ensuring that minority shareholders are entitled to appoint a

representative to the board of directors. This is typically named as a shareholder's special right in terms that even though the shareholder may hold a minority stake it will be allowed to appoint a member of the board (or even more members that the majority shareholder).

9. Portfolio Company Oversight

9.1 Shareholder Control

Despite the experience not being vast, it is possible that private equity investors may influence the appointment of the composition of the board of directors even though the representation of the directors is not always relevant. Also, to deal with investment policies, remuneration considerations or conflicts of interest between the board it is possible to constitute committees for such purpose.

9.2 Shareholder Liability

The piercing of the corporate veil is an available mechanism under Angolan law for purposes of criminal offenses and subject to very strict rules and evidence.

Members of the board of directors may be held liable towards the creditors of the company whenever they commit a legal or contractual fault of their obligations in such a way that the creditors can be protected. Another circumstance it is if the company's estate becomes insufficient to discharge the company's obligations. However, any shareholder, acting alone or together with another shareholder under a shareholder agreement, may appoint managers or members of the auditing body (without the remaining shareholders being entitled to participate in such election) and may also be jointly and severally liable with the appointed person in cases where there is wilful default in the selection of such person and the same has a duty to indemnify.

9.3 Shareholder Compliance Policy

Private equity funds promote that their portfolio companies imposes legal compliance policies, including with respect to anti-money laundering or to avoiding the financing of terrorism which triggers a wider range of duties, such as identify, perform due diligence, refuse or abstain from certain actions, co-operate, maintain secrecy, control, train and communicate.

10. Exits

10.1 Types of Exit

IPOs are not common in Angola.

10.2 Drag Rights

Drag rights are very common in the equity agreements to provide control over the exit to the private equity fund in terms that all shareholders agree to participate in the acquisition of the target company while they would buy/sell at the same terms and prices. This is very often featured in private equity transactions in Angola since the private equity investors are not always in a majority position which is a good mechanism to convince shareholders to agree to the transfer of shares.

10.3 Tag Rights

Tag rights in the other hand are also very common due to the fact that the management team wants to be protected against another possible unknown investors. Through this provision, when the private equity fund sells its stake, the other shareholders may have the right to sell alongside them.

10.4 IPO

As mentioned above, the IPO experience is quite limited. However, the capital market is walking into a modern and mature stage and is expected that with the increase of foreign investors through private equity funds the Angolan private equity market may develop towards more sophisticated structures.

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MC Jurist Angola Advogados (MC JURIST) is a boutique corporate and investment law firm based in Luanda specialised in providing legal and tax consultancy assistance to corporate clients carrying out business and/or holding investments in the Republic of Angola. MC JURIST was established in early 2009 in Angola, with a liaison office in Lisbon, by Nuno de Miranda Catanas and Ana Martins de Carvalho, who have worked to-

gether for more than 20 years, notably in Macao, Hong Kong, Singapore and Angola. MC JURIST currently has 20 fee earners in both Angola and Portugal, with significant experience in industry sectors such as petroleum services, private equity, banking and insurance. MC JURIST is mainly focused in the following practice areas: oil and gas, corporate and investment, tax and customs, employment and HR assistance.

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ANGOLA LAW AND PRACTICE

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